IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

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| ANTHONY GRAVES | § | |
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| | § | CIVIL ACTION NO. G-00-221 |
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| DOUG DRETKE, | § | |
| DIRECTOR, TDCJ-CID | § | |

**ORDER AND OPINION**

Before the Court is the Magistrate Judge's Report and Recommendation concerning two issues under *Brady v. Maryland*, 373 U.S. 83 (1963) remanded to the Court by the Fifth Circuit. After holding an evidentiary hearing, the Magistrate Judge recommends that both of Petitioner's *Brady* claims be denied. Petitioner has filed his Objections after being given an extension of time to do so.

Petitioner first objects to several general aspects of the Report. He complains that the Magistrate Judge used the wrong legal standard to analyze the claims at hand and argues that he has raised various perjury claims related to Robert Carter's testimony. Objections at 2-7. This claim is without merit. In its original Order, this Court showed that Petitioner had raised separate claims regarding the State's non-disclosure of Carter's October 21 statements and the State's failure to correct Carter's allegedly perjured testimony to the jury. *See* Order at 23-29. Petitioner himself confirms this by pointing to Claims 4 and 5 in the Petition, which state separate claims under *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). The Court denied both the *Brady* and perjury allegations as separate issues, and the Fifth Circuit

remanded this case only on the two *Brady* claims. *Graves v. Cockrell,* 351 F.3d 143 (5th Cir. 2003); *Graves v. Cockrell*, 351 F.3d 156 (5th Cir. 2003). Petitioner's reliance on *Giglio*'s materiality standard is therefore misplaced. Objections at 82.

Likewise, Petitioner's Objection to the burden of proof stated in the Report is incorrect. The Report does not allege Petitioner was required to show the trial's outcome would have been different or that it was more likely than not it would have been different. It states he must show there is a "reasonable probability" the result would have changed, understood as a probability sufficient to undermine confidence in the outcome of the trial. *See Martin v. Cain,* 246 F.3d 471, 477 (5th Cir. 2001); Report at 5-6, 13. Likewise, this Court has used the standard articulated in *Kyles v. Whitley,* 514 U.S. 433, 436 (1995), on which Petitioner relies, in its *de novo* review of this case. *Kyles* stresses that the key issue in a *Brady* analysis is whether, in the absence of the undisclosed information, the defendant received a fair trial whose outcome is worthy of confidence. *Id.* at 434.

Before addressing specific Objections, the Court notes several things. first, Petitioner frequently supports his arguments by stating that he has presented "substantial claims of *actual innocence.*" *See, e.g.*, Objections at 75 (emphasis in original). However, Petitioner's actual innocence claim was rejected by this Court and the Fifth Circuit and is no longer at issue in these proceedings. Although claims of actual innocence can serve as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits." *Dowthitt v. Johnson,* 230 F.3d 733, 742 (5th Cir. 2000), the *Brady* issues are not barred, and Petitioner's claim is not so argued.

Second, Petitioner complains that the Report "relies" on Carter's May 18, 2000 deposition to deny his *Brady* claims and that

he has "absolutely no idea" what document certain portions of the Report refer to when discussing the deposition. Objections at 45-46. Neither the Magistrate Judge nor this Court has relied on the deposition in this manner. It is Petitioner himself who urges consideration of the deposition in his materiality brief. Petitioner's claim that he is unable to discern what document the Report refers to in this regard is groundless; the Report specifically cites the precise pages of the 2000 deposition that are discussed.

Third, Petitioner's claim that the Magistrate Judge decided the credibility of witnesses who did not appear before him at the evidentiary hearing is unwarranted. In reality, Petitioner himself made such an argument by stating that, had Carter testified he acted alone, it would have been inherently credible to the jury. The Report merely explores the possible impeachment value of the *Brady* material at issue here by examining it in light of the evidence produced at trial. "[A] *Brady* violating is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt" *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000). Finally, Petitioner complains that the Report misapplies the law of the case doctrine. However, Petitioner fails to address the exceptions to that doctrine noted in the Report or to state any reason why they should not apply in this case.

Petitioner objects to many specific findings in the Report. The Court has carefully reviewed his claims, which contain only three separate citations to the trial record, and finds they show no error in the Report. Insofar as Petitioner complains that the Report misstates his position, the Court finds that the Report fairly characterizes his statements in the materiality brief. Any discrepancies between what is stated in the Report and what Petitioner intended in the brief have been noted by the Court.

More importantly, Petitioner alleges the Magistrate Judge erred

in accepting Sebesta's testimony in the hearing. Petitioner complains that he could not rebut such testimony because certain evidence had not been in his possession for several years, but he fails to identify any evidence that was not available to him by the time of the hearing. Petitioner had ample freedom to cross-exam Sebesta on all points, and he fails to show any reason why uncontroverted testimony should not be deemed credible.

In discussing the first *Brady* issue - Carter's statement I did it all myself" - Petitioner does not dispute the Report's finding that Carter gave nine different versions of events by the close of trial, nor does he address the Report's analysis of the exculpatory statement's impeachment value. Petitioner also misstates the legal requirement for materiality. He claims that because the Report found that it was "possible" Carter's statement could have led to a different result, materiality has been shown. This overlooks the established case law governing *Brad y* materiality standard.

In relation to Carter's statement implicating his wife, Petitioner argues for the first time that his trial attorneys used due diligence to discover the exculpatory statement. For the reasons stated in the Report, the Court finds that they did not. Petitioner's attorneys stated that they did not inquire into Sebesta's in-court statement that Carter had lied about his wife's involvement because Ms. Ray had told them that Cookie was at home at the time the murders took place. Evidentiary Transcript ("ET") at 112, 122. Petitioner complains that this is insufficient because Ray did not testify at trial as an alibi witness. The nature of Ray's testimony is not at issue. Ray stated that she went to bed at midnight, woke up around 3:00 a.m. and saw Carter and her mother together in the house. By all accounts, the murders had already taken place by 3:00 a.m. If Petitioner's attorneys relied on Ray's statement because it allegedly showed Cookie was at home during the specific time the murders occurred, their reliance was unreasonable because ray was asleep at

that time. If their reliance was based on testimony that Carter and Cookie were at home at the same time, it was misplaced because Carter had already been convicted. The fact that Cookie was seen with Carter at 3:00 a.m. was no basis for believing her to be uninvolved with the killings.

The Report distinguishes between the Petitioner's trial theory that "at least two persons" were involved in the murders and the State's theory that three persons acted together. Petitioner complains that the State's theory that three persons acted together. Petitioner complains that the State, in fact, had a theory that two individuals killed the Davis family. Objections at 66. The Court's examination of the record finds no evidence to support this claim, and Petitioner again makes no reference to any portion of the trial record. The State's theory was always that three people were involved, and Sebesta reasserted the point in his closing statements.

Petitioner further states that the three-person theory does not render Carter's statement about Cookie non-exculpatory, and that the defense's theory was not inconsistent with the State's. By definition, of course, three people include "at least two person." However, Petitioner's argument in his materiality brief is exactly what the Report states: suppression of evidence that Cookie was the second suspect enhanced the credibility that Petitioner was the second suspect. According to Petitioner, "[b]y Carter's exculpatory admission, he accounted for the identify of *both* of the possible suspects, i.e. himself and his wife." Brief at 14 (emphasis in original). Although it is undisputed three people had been indicted, Petitioner here assumes that only two people were under active suspicion and that identifying the second suspect as Cookie makes Carter's statement about her exculpatory in regard to himself.

Had Sebesta revealed the statement about Cookie, however, it would have implicated *three* persons, not two. It would have

directly re-implicated Petitioner and would have confirmed the State's three-person scenario. As the Report notes, Petitioner's own trial counsel admitted that Carter's claim that he killed the Davis family with Petitioner and Cookie would not have been helpful to Petitioner's defense; only a claim that Carter and Cookie acted together without Petitioner would have served. ET at 173. No evidence shows that Carter ever made such a claim.

Petitioner complains that the polygraph report, which contrary to his claim was specifically referred to in the Report, did not implicate him. The issue at stake here is not what the report itself states but what Carter told Sebesta. Before the exam was administered, Carter claimed to Sebesta that he had committed the murders with Petitioner and a third person called "Red" was, in fact, Cookie; it was not designed to question the issue of Petitioner's involvement. As Sebesta testified, "[i]t was a given the whole evening [Petitioner] was involved." ET at 95. When Carter admitted that Cookie was "Red," this did not exonerate Petitioner, as he appears to claim, because the context of the exam was clearly one that assumed Petitioner's involvement. Sebesta unambiguously testified Carter never stated he acted only with Cookie and that Petitioner's involvement was never in doubt. Id. at 96.

Petitioner objects to the Report's finding that the combined evidence of the statements in question does not violate *Brady*. The Court's review of the trial record leads it to the same conclusion as the Magistrate Judge. Petitioner argues somewhat obscurely in this regard that Carter was "broken down" by the State on October 21, an allegation that occurs throughout his Objections. Objections at 70. The Court agrees with the Magistrate Judge's finding that the record does not support this conclusion. The evidence set forth in the Report shows that the deal finally struck between Carter and the State was not the trigger for obtaining his testimony against Petitioner in the manner that he argues or that Carter would

otherwise have testified to Petitioner's innocence.

Finally, Petitioner claims he is entitled to an abatement of his federal case. Petitioner claims he would be harmed if abatement is denied, but he provides no relevant argument and does not contest the Report's finding that the discovery process involved in his subsequent state claims are separate from those at issue here. Likewise, Petitioner has not shown that the instant case cannot be decided without abatement.

Having given this matter *de novo* review under 28 U.S.C. § 636(b)(1)©), this Court finds that nothing in Petitioner's Objections controvert the Magistrate Judge's findings. Therefore, the Report and Recommendation should be, and is hereby, **ACCEPTED**.

Accordingly, it is **ORDERED** that Petitioner's Motion to Abate (Instrument No. 102) is **DENIED** and that the two *Brady* issues on remand from the Fifth Circuit are also **DENIED**.

**DONE** at Galveston, Texas this 16th day of February, 2005.

**SAMUEL B. KENT**
**UNITED STATES DISTRICT JUDGE.**